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ABSTRACT

Two newsletter articles are presented that examine legal aspects of campus collective bargaining: (1) "Campus Bargaining and the Law: A Decade of Higher Education Collective Bargaining--1972-1982" (June M. Weisberger); and (2) an analysis of the the Appellate Court decision in the S. Simpson Gray case. The first article examines major labor relations developments in the past decade and themes affecting higher education faculty. Attention is directed to the following five topics that contain relevant labor relations and employment law information: student participation, peer review, financial exigency, academic decision making process, and agency shop. Student participation refers to legal provisions by four states to allow student representatives a statutory role during faculty bargaining, while peer review pertains to tenure review deliberations and votes by faculty. Financial exigency has been an argument posed by some universities in the decision to lay off tenured faculty. The second article reviews the S. Simpson Gray decision, which held that Gray was entitled to be informed of the votes of two members of the collegewide Personnel and Budget Committee that denied him reappointment with tenure. (SW)

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# CAMPUS BARGAINING AND THE LAW: A DECADE OF HIGHER EDUCATION COLLECTIVE BARGAINING—1972–1982

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**by June M. Weisberger***

*Editor's Note:* These remarks were delivered at the Tenth Annual Conference of the NCSCBHEP in April 1982. Professor Weisberger was not asked to comment on *NLRB v. Yeshiva* and thus the absence of any analysis with respect to that issue should not be considered an omission on her part. Since this paper was delivered, the decision of the Appellate Court in the S. Simpson Gray case was handed down. The reader is directed to the second article in this Newsletter for an examination of this case.

## Introduction

As any serious observer of the higher education academic collective bargaining scene today knows, this area of labor relations law is the most complex. It is most complex because it requires knowledge of both the traditional and the rapidly changing higher education academic setting as well as general and specific labor relations law under the National Labor Relations Act as amended. It also requires knowledge of the patchwork quilt of state statutes and judicial and administrative agency decisions governing public sector labor relations in a number of different jurisdictions. In addition, a knowledgeable practitioner in this area should also be aware of the patchwork quilt of other but very important related developments under Title VII, under the Equal Pay Act, and even under a constitutional law analysis, where appropriate. All these areas are not part of traditional labor relations law but they affect both directly and indirectly the general area of employment relationships in higher education. Major labor relations legal developments of the past decade and themes affecting higher education faculty are examined in this article; not in technical legal terms, such as specific representational or scope of bargaining decisions, but in broad terms. Five topics, containing relevant labor relations and employment law information, are discussed below.

*Student Participation*

The first topic involves student participation in faculty collective bargaining in higher education and the developing statutory law. In the early seventies there were certain experiments by agreement of the parties involving student participation in various ways during faculty-university collective bargaining. The most well publicized experiment took place at several Massachusetts state universities resulting in several innovative and interesting state statutory schemes. Starting first in Montana in 1975 and continuing in Oregon, Maine and Florida, there are now four different statutory models[1] concerning student participation in some fashion at the collective bargaining table. Montana, the first attempt, produced a bill that received support from not only the Montana student body lobby, the AFT, but eventually the state higher education commission. In the Montana scheme, students participated in the management caucus as well as being permitted by statute to act as observers at the collective bargaining table.

The next statutory experiment was that enacted in Oregon in 1975. This legislation is perhaps the most perplexing because under Oregon state statute student representatives are permitted "to comment in good faith during the bargaining sessions on matters under consideration" and are allowed "to meet and confer" (the phrase used in the NLRA to mean bargain collectively) with the exclusive faculty representative and the public employer regarding the terms of any agreement between them prior to execution of a written agreement incorporating the parties' understandings.

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*Dr. June M. Weisberger is a Professor of Law at the University of Wisconsin Law School.

In 1977, Florida gave students the right to comment to both parties and to the public during negotiations regarding the impact on the "educational environment," the phrase used in the legislation. Also, students were permitted "to participate in good faith" during all negotiations. In 1979, the Maine legislature provided for student representatives "to meet and confer" with university bargainers during negotiations and with both parties prior to bargaining.

These various experiments have not found widespread support elsewhere yet and, therefore, many may think that this is an interesting development but one of academic interest only. I suggest that this topic may be one where there may be renewed legislative interest. While there is no widespread movement to follow the four jurisdictions where statutes have been enacted giving a statutory role to student representatives during faculty bargaining, rapidly escalating student costs may renew student interest and thus put pressure on legislatures for additional experiments in other jurisdictions that either parallel or deviate in some interesting way from these first four models.

If there are to be additional legislative experiments and a following of the pattern in part or in whole of these four jurisdictions, additional issues will have to be dealt with in the legislation. There are already interesting variations in the four jurisdictions not only as to the roles of the student representatives, but also 1) how student representatives are chosen, 2) what access students will have to documents exchanged by the parties during collective bargaining and during any impasse procedures, and 3) the important question of confidentiality of the collective bargaining process.

*Peer Review*

The second topic has to do with tenure review deliberations and votes by faculty. The question specifically is, "is there an academic freedom privilege which will insulate the decision making process when the decision is challenged in a variety of forums and the vote of the participants is alleged to be a critical element of a complainant's case?" So far the law has given us no clear-cut answer. We have two very different approaches demonstrated by two federal courts in 1981. The cases involve the City University of New York,[2] on the one hand, and the University of Georgia,[3] on the other.

In the New York case, the plaintiff was denied reappointment with tenure by one of the community colleges within the City University of New York system. It was alleged that this action was based upon unconstitutional race discrimination. During discovery, the complainant sought the votes of two named defendants in the peer review process which led to that adverse tenure decision. The individual defendants refused to answer citing an academic freedom privilege. The court upheld the asserted privilege that was put forth by the defendants noting that academic freedom, in the judgment of that court, is a transcendent value which encompasses the concept of peer review by secret ballot. Thus the decision is isolated from improper pressures. In addition, the court said that equivalent evidence might be had in other ways so as not to reveal the voting. Societal interest in protecting the secret ballot, in that court's judgment, outweighed the complainant's right to discover the individual votes of the two named defendants.

In another case involving somewhat similar circumstances, the trial court and the appellate court went in a different direction. In the case involving the University of Georgia, the plaintiff alleged Title VII sex discrimination in the decision of the University not to promote her to an associate professorship. During pre-trial activities to depose various other participants in the tenure decision vote, Professor Dinnan refused to devulge his vote in that review process. Upon motion, the court attempted to compel his testimony and he again refused. He was cited for contempt and jailed. The Fifth Circuit Court of Appeals affirmed the trial court's finding that Professor Dinnan was indeed in contempt of court. It concluded that society's value in discovering the truth outweighed the privilege that the defendant attempted to assert in his particular case. It rejected the type of analysis that the New York federal district court engaged in the *City University of New York* case.

Given these two diverse answers to this particular problem area of conflicting societal values, this question will no doubt be repeatedly litigated until some more definitive answer is given to this perplexing balancing problem arising under the constitution, under Title VII, or under various other forms of protective legislation. The required balancing process is certainly not an easy one to resolve on the merits or to predict the eventual outcome.

*Financial Exigency*

The third area identified as a major and troublesome one of legal developments during the past decade involves the question of financial exigency and the courts. It is clearly an area of increasing concern as fiscal problems and constraints become more and more pressing for a large number of academic institutions. Specifically the post-*Bloomfield College* developments[4] have been studied to see what light has been shed upon the problem of how courts will approach tenured faculty layoffs in the context of a university's argument of financial exigency. Over the past ten years, shrinking financial resources of universities have threatened the traditional institution of faculty tenure. The main legal questions are: 1) under what circumstances does financial exigency exist?, and 2) what is the proper role of the courts in judging the existence of financial exigency? In this critical area, the developing case law provides some answers.

First, it is known from the case law that the financial exigency must be a *bona fide* one. If almost immediately following the layoff or discharge of tenured faculty new faculty or replacements are hired, the financial exigency defense of the university or college will be seriously questioned. If there are related developments that do not go directly to financial exigency but appear to be an attack on the basic institution of tenure, the financial exigency claimed by the institution of higher education will be viewed as something less

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than *bona fide*. One example is the one-year terminal contract that the Bloomfield College administration attempted to impose on other faculty members. As a result of the appellate court decision in *Bloomfield College* and other cases, it is also known that a court will probably not view specific financial decisions of university decision-makers as a critical determinant in whether there is a *bona fide* financial exigency. It is known what type of evidence courts have been particularly impressed with in determining whether a *bona fide* decision of financial exigency has been made. For example, several cases specifically mention testimony documenting declining enrollment or specific evidence of recurring operating deficits.

There is another interesting as yet unresolved question. In looking at evidence of recurring operational deficits, is the appropriate universe the entire university structure or may proof of operating deficits relating only to one program or one department be sufficient to prove that a *bona fide* financial exigency exists?

There are also some constitutional dimensions in this area of the law that have produced some interesting judicial decisions. One obvious conclusion to be drawn is that a decision finding financial exigency cannot be used as a pretext for violating a constitutional right (or a statutory or contractual right). Other constitutional developments relate to the procedural due process that may be required in deciding which faculty to lay off once the determination of *bona fide* financial exigency has been made. In an interesting case in the Western District of Wisconsin, *Johnson v. Board of Regents of the University of Wisconsin System*,[5] Judge James E. Doyle gave a very interesting analysis and set forth guidelines for certain minimal procedural due process rights that faculty members have in what he characterized as a non-adversarial setting. As the decision indicates, these are not full due process, adversarial hearing rights which traditionally would include cross examination, etc. In addition, there are minimum standards of equity that certain courts have pointed to requiring "uniform procedures" with "reasonable standards" to determine which faculty to lay off.

There is a related and interesting question in the financial exigency, lay-off area as to whether a university has an obligation to make feasible efforts to find the adversely affected tenured faculty member alternative employment. This approach, imposing upon the university an additional burden not only to prove the *bona fideness* of the financial exigency but to take affirmative action to provide alternative employment, is a concept developing apart from express contractual obligations. It has not found judicial support but, I suggest that there might very well be additional cases brought to pressure the parties to have this type of affirmative action incorporated explicitly or implicitly in lay off procedures.

There is currently a debate going on reported in the *Chronicle of Higher Education*.[6] These news stories concern whether university decison makers have a broad power to lay off tenured faculty when there is no financial exigency but when management believes programmatic changes are desirable in a whole variety of circumstances. Courts may increasingly be willing to define financial exigency broadly and to accept a wide variety of evidence and proof of what is a financial exigency. As to whether the courts will go beyond this, however, and define financial exigency to include programmatic changes as a basis for laying off tenured faculty, requires a big judicial leap. That leap will only be taken, where the programmatic changes are not *solely* a result of a management decision to change the direction of the enterprise but a decision reflecting faculty input, perhaps in the form of a faculty study and review committee recommendation. The articles of the *Chronicle of Higher Education* indicate this to be highly controverted area. Laying off of tenured faculty for programmatic changes in contrast to a financial exigency argument (even one very broadly or liberally defined) is a new legal argument and one that courts will look at very thoughtfully and with hesitation.

*Academic Decision Making Process*

The fourth legal area is one concerning judicial reluctance to intrude on the academic decision making process and how courts should handle "mixed motive," adverse personnel decisions. Over the past decade many courts have frequently expressed their desire to leave tenure and other personnel decisions involving higher education faculty untouched despite challenges based upon allegations of discrimination, interference with protected activities or contract violation. Courts have been very ready to acknowledge their lack of qualifications to make these decisions and initially at least have accorded significant weight and value to the academic peer review process by which these decisions are made.

The most often cited case demonstrating extreme judicial reluctance to interfere with the peer review process is *Faro v. New York University*,[7] a 1974 Second Circuit Court of Appeals decision. The reluctance demonstrated by the court in *Faro* and by other courts in other decisions suggests that in the academic higher education setting, normal rules governing constitutional challenges, statutory discrimination and appropriate remedies might have different outcomes. Indeed that has been the trend of cases decided at the beginning of the decade under study.

The current trend, however, appears to modify that early reluctance by courts to interfere with academic decision making. Relatively recently the Second Circuit, the same court that decided *Faro*, had this to say: "We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever mindful of relative institutional competencies, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964." This quotation comes from a Title VII discrimination case involving Syracuse University[8] and is an express acknowledgement by the Second Circuit that its earlier statement giving heavy weight to the academic peer review process due to the special competence of institutions of higher education (and not courts) seriously influenced a number of judicial decisions following the *Faro* decision.

There has been a decided reluctance to grant tenure as an appropriate remedy for various kinds of violations of constitutional or statutory law in academic settings. In a recent case involving Muhlenberg College,[9] however, the court demonstrated no such reluctance where the faculty review committee had recommended tenure but that tenure decision recommendation by the committee had not been implemented by the administration. Admittedly, this is not a difficult case in which to grant tenure as an appropriate remedy. However, it is clearly a step away from that earlier reluctance to interfere in any way with the academic decision making processes of higher education.

Similarly, in "mixed motive" cases where adverse personnel decisions have been made and the plaintiff or complainant alleges that a "bad" or impermissable reason was the basis for the decision while the institution defends by pointing to a *bona fide* reason, institutions are at least required to articulate a permissible reason. There are several pronouncements by the United States Supreme Court in the context of mixed motives cases. They also reflect some backing away from earlier, heavy deference accorded to institutions of higher education in their personnel judgments. Two cases decided by the Supreme Court, *Mount Healthy City*

*School District v. Doyle*,[10] a public school case, and *Keene State University v. Sweeny*,[11] a higher education case are relevant. In *Mount Healthy*, there is some formulation of how courts should handle cases where either the allegation is made that the reason given by the university is a pretext for prohibited or improper decision making or several reasons contributed to the adverse decision and at least one was improper.

In *Mount Healthy* the Supreme Court tells the parties that the plaintiff must initially show that the improper consideration was the motivating factor for the higher education institutions' adverse personnel decision. Then the burden to produce additional evidence (but not the burden of persuasion) shifts. At that point, the institution of higher education has to demonstrate that the same decision would have been made in the absence of the protected (constitutional, statutory or contractual) activity. There are some who believe that in the higher education setting the *Mount Healthy* analysis (where the burden of evidence is first allocated to the plaintiff or the complainant to make a prima facie case and then shifts to the institution to defend the action by producing proof that that same decision would have been made even if the improper motive had not been part of the picture) has been changed by the 1978 United States Supreme Court decision in *Board of Trustees of Keene State College v. Sweeney*.

It has been suggested that a very careful reading of the *per curiam* decision does not change the *Mount Healthy* analysis and that *Mount Healthy* is alive and well whether one is talking about an adverse personnel decision by a public school system, by a municipality or by an institution of higher education. The Supreme Court's *per curiam* decision stated: "while words such as 'articulate,' 'show,' and 'prove' may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely 'articulating some legitimate nondiscriminatory reason' and 'proving absence of discriminatory motive'." The Supreme Court majority is quite clear that the employer does not have to prove the absence of discriminatory motive. The required articulation of "some legitimate nondiscriminatory reason" does not negate *Mount Healthy*'s holding that the employer must produce evidence to indicate that the same decision would have been reached even in the absence of the alleged improper reason.

For those interested in developing law under the National Labor Relations Act, there is another indication that *Mount Healthy* with its allocation of burdens in mixed motive and pretext cases is alive and well. In its 1980 decision in *Wright Line*,[12] the NLRB in the context of interpreting the National Labor Relations Act held that where an employee is allegedly fired because of his or her protected activities under the NLRA and the employer claims that the firing was for some legitimate reason, a *Mount Healthy* analysis is appropriate.

*Agency Shop*

The last area to be discussed is very different from the four already noted. It concerns developments following the United States Supreme Court decision in *Abood v. Detroit Board of Education*.[13] More specifically, what agency shop or fair share fees may be charged to members of the bargaining unit who do not belong to the exclusive bargaining representative? This area is just beginning to be explored in great detail and is one that has a great deal of significance not only to the individual employee but also to exclusive bargaining agents who depend upon revenues coming from agency shop or fair share agreements. It also is of concern to employers who are certainly affected by legal developments in this area.

In *Abood*, the Supreme Court applied, in the public sector context, already developed private sector labor law concepts and upheld a statutory provision relating to Michigan public employers which permitted an agreement between a public employer and union requiring non-members of the bargaining agent to pay for services relating to the union's collective bargaining and contract administration functions. The challengers claimed that their constitutional rights of free speech and free association were infringed upon when as employees they were required to make payments under their collective bargaining agreements for union services. Looking at the public policy issue, the Supreme Court majority held that public employees are similar to private sector employees, although there may be significant differences between public employers and private sector employers. The Court emphasized employee similarity and agreed with the unions that "free riders" should not be permitted in the public sector any more than they are permitted in the private sector. Since all members of the bargaining unit under a statutory scheme of exclusivity receive the benefits which flow from the exclusive bargaining agent's activities at the bargaining table and during contract administration, all members of the bargaining unit may be required to pay for these services. If all bargaining unit members may be required to pay for a union's collective bargaining and contract administration services, but not for political or ideological causes supported by the union, where is this critical line to be drawn? What is a permissable union activity which every bargaining unit member may be required to pay for and what falls on the other side where only voluntary contributions may be expended?

There has been surprisingly little helpful litigation in the private sector pre-*Abood*. Post-*Abood*, two very different approaches have been developed. In a case involving the Communication Workers of America and members of a bargaining unit who objected to many union expenditures, a master appointed by a federal district court in Maryland recommended that 81% of the union dues already paid be rebated to objectors.[14] Two aspects of this decision should be noted. First, the master believed that collective bargaining and contract administration services should be defined very narrowly. Therefore, there should be a significant rebate to objecting bargaining unit members. Further, the master found insufficient evidence to permit an apportionment for time spent by the union staff members in activities directly related to contract administration and collective bargaining for which all may be required to pay and other activities for which non-members of the union could not be charged. Because of apportionment difficulties, most expenditures for union staff were subject to the rebate procedure. Thus there were two reasons for recommending the large rebate. This case has recently been remanded again to the master for further findings so the ultimate outcome is uncertain. In a very different decision, Donald Wollett served as arbitrator in a case involving the State University of New York and the exclusive bargaining agent for the university faculty and determined that the correct refund was $.07.[15]

Perhaps the most instructive decision to date which attempts to distinguish systematically among various types of union activities in the context of fair share or agency shop fee litigation is one issued about a year ago by the Wisconsin Employment Relations Commission. The case is *Browne v. Milwaukee Board of Education*.[16] Although this is a public school case, it is relevant for both private and public institutions of higher education. *Browne* was initially decided on constitutional grounds by the Wisconsin Supreme Court which took an *Abood* approach holding that it was

constitutionally permissable for the Wisconsin legislature to permit "fair share" or agency shop clauses if municipal employers agree. In this case, the Milwaukee Board of Education agreed to a fair share clause. Objectors filed lawsuits claiming their constitutional rights were infringed upon, using the same type of arguments raised in *Abood*. The Wisconsin Supreme Court, after finding that the statute was constitutional on its face, remanded the case to the Wisconsin Employment Relations Commission (WERC), the state agency with jurisdication over public sector labor relations in Wisconsin. In prehearing informal meetings, the parties to the litigation agreed that the WERC should look at this case in two stages.

The February 1981 decision of the WERC relates to stage one only. In its decision, the WERC addressed 31 areas of union expenditures specifically enumerated and agreed upon by the parties. Because of the importance of these categories, a detailed reading of this decision is worthwhile for those particularly interested in this problem area. To give some idea of the questions that were before the Wisconsin Employment Relations Commission, these are some examples of the areas discussed in this frontier decision: organizing bargaining units in which the complainants were not employed and seeking representation rights in units not represented by the respondent union, including units where there is an existing exclusive bargaining agent. The WERC found that these were appropriate activities to be financed by all members of the bargaining unit.

Other examples of activity where all members of the bargaining unit, not just union members, may be required to pay: defending respondent unions against efforts of other unions or organizing committees to gain representation rights in the units represented by the respondent unions; participating in proceedings regarding jurisdictional disputes under the AFL-CIO constitution; lobbying for collective bargaining legislation or regulations or to effect changes in or lobbying for legislation or regulations affecting wages, hours and working conditions of employees generally before Congress, state legislatures, and state and federal agencies. Also, fair share agreements may require all bargaining unit members to support and pay affiliation fees to other labor organizations that do not negotiate collective bargaining agreements governing the complainants' employment to the extent that such support and fees relate to the representational interests of unions in the collective bargaining process and contract administration. The list goes on and includes publishing newsletters, holding membership meetings and conventions which relate to the representational interest in the collective bargaining process and contract administration.

Finally it is interesting to note two additional items in this extensive lists of activities where non-members may be required to pay: lawful impasse procedures to resolve disputes arising in collective bargaining and in the enforcement of collective bargaining agreements and the prosecution or defense of litigation or charges to enforce rights relating to concerted activity, collective bargaining, and collective bargaining agreements. Some examples of activities which the WERC believes should be financed only by union members include: training and voter registration, get-out-the-vote, and campaign techniques; supporting and contributing to charitable organizations, political organizations, and candidates to public office; ideological causes and international affairs; public advertising on matters not relating to the representational interest in the collective bargaining process and contract administration; purchasing books and services, paying for technical services and lobbying when not related to the representational function. Because of its comprehensive approach, it is believed that this WERC decision will be given significant weight in the decision making process elsewhere.

*Conclusion*

Reviewing the list of five topics, one finds, of course, some important omissions. Perhaps the two most notable, with the exception of *Yeshiva*, relate to the duty of fair representation and age discrimination, both topics which are foreseen as critical areas which will concern unions, administrations, and individual employees during the next decade. Several cases already decided in the past decade have at least identified problems in these areas and give some indication of the direction of the developing law. The above cases serve to underscore the general theme that a labor relations practice today, whether it be engaged in by lawyers or by non-lawyers, requires the practitioner to view broadly his or her substantive interests and functions. Any ten-year retrospective approach would be severely defective unless it emphasized this point.

**Footnotes**

1. Mont. Code Ann. § 39-31-302 (1979) 1975; Or. Laws ch. 679; Me. Rev. Stat. Ann. tit. 26, § 1024-A(6) (Supp. 1982-83); Fla. Stat. Ann. § 447.301 (West 1981).
2. *Gray v. Board of Higher Education*, 92 F.R.D. 87 (S.D.N.Y. 1981).
3. *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, (U.S. June 7, 1982) (No. 81-1714).
4. *AAUP v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (1975). See also *Browzin v. Catholic University*, 527 F.2d 843 (D.C. Cir. 1975); *Scheuer v. Creighton University*, 199 Neb. 618, 260 N.W.2d 595 (1977); *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978).
5. *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).
6. "Chron. of Higher Ed.," March 17, 1982 at 1, Col. 2; Chron. of Higher Ed., March 31, 1982 at 1, Col. 2.
7. *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974).
8. *Powell v. Syracuse University*, 580 F.2d 1229 (2d Cir. 1978), *cert. denied*, 439 U.S. 984 (1978).
9. *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980).
10. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). See also *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).
11. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).
12. *Wright Line*, 251 N.L.R.B. 1083, 105 L.R.R.M. 1169 (1980).
13. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).
14. *Beck v. Communication Workers of America*, 468 F. Supp. 87, 93 (D. Md. 1979); *Beck v. Communication Workers*, 106 L.R.R.M. 2323 (D. Md. 1981) (ordering remand).
15. "Arbitrator Finds UUP Did Not Expend Extra Monies for Outside Activities," 878 Gov't Empl. Rel. Rep. (BNA) 22 (Sept. 8, 1980).
16. *Browne v. Milwaukee Board of School Directors*, WERC Dec. No. 18408 (February 3, 1981). See also 83 Wis. 2d 316, 265 N.W.2d 559 (1977).

# PEER REVIEW REEXAMINED

*Introduction*

Holding that "absent a statement of reasons, the balance tips toward discovery and away from recognition of privilege" the United States Court of Appeals for the 2nd Circuit held that S. Simpson Gray was entitled to be informed of the votes of two members of the college-wide Personnel and Budget (P&B) Committee that denied him reappointment with tenure (See *S. Simpson Gray v. Board of Education, City of New York, et al.*, United States Court of Appeals for the 2nd Circuit (Docket No. 82-7135), November 15, 1982). Gray, an instructor at LaGuardia Community College of the City University of New York, was denied reappointment with tenure (See *NCSCBHEP Newsletter*, Vol. 9, No. 5 for a complete analysis of the findings of the United States District Court for the Southern District of New York case) and brought suit in federal court seeking discovery of the votes of his department chairman and dean of the college. The United States District Court for the Southern District of New York (*S. Simpson Gray v. Board of Higher Education, City of New York* 79 Civ. 0062) held that faculty members serving on tenure committees could not be required to divulge their votes and that a qualified privilege of academic freedom existed. Gray appealed that decision and an analysis of the findings of the Appellate Court is set forth below.

*The Nature of the Process*

Jerry Bergman, writing on "Peer Evaluation of University Faculty" in the *College Student Journal*, Fall 1980, found that ". . . there is no consistent empirical evidence to support the efficiency of peer evaluation." In spite of this, universities persist in using this form of evaluation for tenure and promotion purposes. Bergman cited numerous references to substantiate this premise and concluded that "there is little evidence that peer evaluation is a valid or reliable means of evaluating university faculty." He identified several factors which influenced peer ratings and found them, based on subjective elements, far removed from teaching effectiveness. Factors such as "race, religion, political orientation, gender, etc.," indirectly tend to be important criteria in the outcome of peer review. He suggested that if a college or university elects to use peer evaluation, it should be done with extreme caution and, perhaps, used only for advisory purposes.

In spite of Bergman's cautions, peer review is widely used and is now an integral part of college governance machinery. The findings in *Gray*, or in numerous prior cases, do not seek to eliminate the peer review process but instead try to balance the rights of both the individual and the process itself, as well as to distinguish critical aspects associated with both.

*Dinnan v. Blaubergs*

Many of the arguments advanced in *Gray* were initially found in *Dinnan*, in which the United States Court of Appeals for the 11th Circuit refused to extend the concept of absolute privilege to Professor Dinnan holding that his claim of academic freedom and privilege did not grant him immunity from revealing his vote in a tenure committee deliberation. (See In Re Dinnan: *Blaubergs v. Board of Regents of the University System of Georgia*, 661 F.2d 426, 430 (11th Cir. 1981), Cert. denied, subnom. *Dinnan v. Blaubergs*, 50 U.S.L.W. 3962 (U.S. June 7, 1982) (No. 81-1714). Additionally, the court in *Gray* was faced with the question of whether or not the holding of the 11th Circuit Court of Appeals in *Dinnan* was dispositive.

Speaking to *Dinnan*, the court in *Gray* stated:

> In *Dinnan*, an employment discrimination suit, the 11th Circuit . . . rejected as not "even slightly persuasive" arguments that a qualified privilege is necessary to protect societal interests in academic freedom and a secret ballot 661 F.2d at 430. The court compelled discovery of a faculty tenure committee member's vote. While we have no occasion to agree or disagree with the result in *Dinnan*, we think the opinion accords too little weight to the concerns for confidentiality in the academic tenure decision-making process. (See Footnote No. 6—*Gray v. Board of Higher Education, City of New York).*

In one of those rare instances, this decision satisfied both the plaintiff and defendant. The court appears to have established "a qualified privilege" acknowledging the need for confidentiality in certain circumstances thereby pleasing the university.

The court stated:

> Rather than adopting a rule of absolute disclosure, in reckless disregard of the need for confidentiality, or adopting a rule of complete privilege that would frustrate reasonable challenges through the fairness of hiring decisions, our decision today holds that absent a statement of reasons, the balance tips toward discovery and away from recognition of privilege. A policy requiring disclosure of votes in the absence of stated reasons when they have been requested permits a plaintiff a fair opportunity to uncover evidence necessary to establishing a prima facie case of discrimination. But unlike a rule of complete disclosure, the discovery permitted in this case will not chill peer review decisions. Future decisions, supported by a detailed statement of reasons, given to the faculty member on request, will be shielded from routine discovery.

*Past* peer review decisions for which no reasons were given may be discoverable, but they have already been made and the internal workings of those decisions cannot be affected at all by our adoption of the AAUP position. Thus, colleges and universities lose none of the benefits of the candor that informed those decisions.

Plaintiff Gray was, of course, pleased with the holding that he was entitled to the discovery of the two votes in question and indicated that further action would be forthcoming.

Concerning the threat to academic freedom, the court stated:

> Academic freedom will not be significantly threatened by our decision here, which poses no significant hazards to peer review and collegial interaction. While a rule allowing routine discovery of tenure votes could chill frank discussion and engender disharmony among faculty, the institution's substantial adherence to the principles and procedures espoused in the AAUP Statement will in many cases avert the need for judicially-enforced discovery. In those circumstances, unlike the case before us today, it may be appropriate to assert a qualified academic peer review privilege.

In summary, the court concluded:

> Moreover, it should be recalled that "academic freedom" is a concept fashioned from other constitutional rights, including the First Amendment and due process of faculty to avoid censure for the views they teach and espouse. It is true that these rights stand for more than the mere aggregation of the First Amendment freedoms of individual faculty members and students when they are exercised on campus — a forum whose high and chief purpose is a robust exchange of ideas — and that academic freedom thus stands apart from the freedom of those individuals who exercise it. But academic freedom is illusory when it does not protect faculty from censurious practices but rather serves as a veil for those who might act as censors. Because our decision today inhibits capricious nonrenewal of employment based on race rather than academic grounds, we believe it to be basically consistent with the goals of academic freedom.

*The AAUP Statement*

The court appears to have relied quite strongly on an *amicus curiae* brief submitted by the AAUP. In that brief, the AAUP argued that "if an unsuccessful candidate for reappointment or tenure receives a meaningful written statement of reasons from the peer review committee and is afforded proper intramural grievance procedures, disclosure of individual votes should be protected by a qualified privilege." The court acknowledged and praised the AAUP's valuable contribution that it made "in the past in resolving a wide-range of educational controversies. . ."

Citing the AAUP brief, the court held:

> The AAUP Statement, insofar as it is applicable here, concludes that faculty members, upon request, should be informed in writing of the reasons for a decision against reappointment. Recognizing the latitude that must be given the institution acting through its faculty, but balancing academic freedom against standards of fairness, the Statement seeks to take into account the confusion that can occur between the limited rights of probationary faculty members and the due process rights guaranteed to tenured faculty, but nevertheless determines that reasons must be given the faculty member denied reappointment or tenure who request them. This is to permit the rejected probationer to remedy identified shortcomings, to correct erroneous information on which the peer review committee based its decision, as well as perhaps to realize that the decision resulted from institutional considerations unrelated to his or her competence. A statement of reasons also may serve to avoid arbitrariness or lack of consideration in the decision-making body itself.

The AAUP brief was based, in part, on the 1971 *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*. These Standards require:

1. *Criteria and Notice of Standards*. The faculty member should be advised, early in his appointment, of the substantive and procedural standards generally employed in decisions affecting renewal and tenure. Any special standards adopted by his department or school should also be brought to his attention.

2(a). *Periodic Review*. There should be provision for periodic review of the faculty member's situation during the probationary service.

2(b). *Opportunity To Submit Material*. The faculty member should be advised of the time when decisions affecting renewal and tenure are ordinarily made, and he should be given the opportunity to submit material which he believes will be helpful to an adequate consideration of his circumstances.

3. *Notice of Reasons*. In the event of a decision not to renew his appointment, the faculty member should be informed of the decision in writing, and, if he so requests, he should be advised of the reasons which contributed to that decision. He should also have the opportunity to request a reconsideration by the decision-making body.

4. *Written Reasons*. If the faculty member expresses a desire to petition the grievance committee . . . or any other appropriate committee, to use its good offices of inquiry, recommendation and report, or if he makes a request for any other reason satisfactory to himself alone, he should have the reasons given in explanation of the nonrenewal confirmed in writing.

Should the individual faculty member believe that the non-reappointment was based on an allegation of academic freedom violation, the AAUP Statement further addresses those concerns. (See *AAUP Policy Documents and Reports*, 1977 edition).

Thus the ruling in *Gray* established a qualified compelling interest in confidentiality while, at the same time, supported the balancing test in favor of discovery.

*"BRAIN"*

A computerized search by the National Center of forty-four collective bargaining agreements from the largest unionized four-year colleges and statewide university systems indicated that reasons for non-reappointment were required in fifteen contracts. Nine of the contracts surveyed had no provisions requiring reasons to be given while an additional eight had variations that required reasons in specified situations. Only those instances in which the employer was automatically required by contract to give reasons to faculty were coded in this computer search; thus if reasons were required to be given to an arbitrator or an appeals committee in defense of a personnel action, they were not reflected in this survey. Table One sets forth each of the categories surveyed by "BRAIN" (Baruch Retrieval of Automated Information for Negotiations) with respect to the number of provisions encountered, as well as offering a statistical breakdown in each category.

Those instances where the employer was required to give reasons which the employee could appeal to the grievance procedure were found in the agreements at the University of Cincinnati, City University of New York, Eastern Michigan University, Florida State University, University of Hawaii, University of Maine, Pennsylvania State College System and Western Michigan University. The agreement at the State University of New York (Contract Expiration Date, June 1982) provided that academic employees who received a written notice that their term of appointment would not be renewed upon expiration had the right to submit a request for reasons to the college president. Written reasons were required to be given to faculty in those situations where the initial academic review committee recommended the employee be reappointed and the college president disagreed. In those cases where the initial academic review committee had recommended a continuing appointment and a subsequent academic review committee concurred, the college president was required to indicate the reasons for notice of nonrenewal and the right to a review.

In ten agreements, employees were not required to be given reasons but were allowed to submit the issue of their non-reappointment to either the grievance procedure or to a special committee. This type of language was found in agreements at the University of Bridgeport, Bryant College, University of Connecticut, Hofstra University, University of North Iowa, Pratt Institute, Regis College, Utica College, Wayne State University and Wentworth Technical Institute.

Five agreements mandated that reasons for non-reappointment be given, however, employees were given internal redress rights only. These types of clauses were found at Emerson College, Fairleigh Dickinson University, Oakland University, University of South Dakota and Youngstown State University.

It must be noted that this survey was restricted only to unionized four-year colleges and statewide university systems. It is in these types of institutions that the issue of governance and peer review is generally considered to be most significant. The majority of those agreements that have negotiated this topic give reasons and it is anticipated that the decisions in *Gray* and *Dinnan* will give added support to those who seek to expand contractual protections for job security. What is unclear at this time is that once reasons have been granted, what recourse will faculty members have at that point?

**TABLE ONE**
**JOB SECURITY: NON-REAPPOINTMENT-APPEALS PROCEDURE**

| | *Contract* | | *Employees* | |
|---|---|---|---|---|
| | # | % | # | % |
| No provision | 9 | 20.5 | 4,565 | 7.2 |
| Employer required to give reasons but no appeal allowed | 2 | 4.5 | 286 | 0.5 |
| Employer not required to give reasons and no appeal allowed | 2 | 4.5 | 906 | 1.4 |
| Employer required to give reasons and employee may appeal to grievance procedure | 8 | 18.2 | 31,160 | 49.4 |
| Employer required to give reasons and employee may appeal to appeal committee | 3 | 6.8 | 952 | 1.5 |
| Employer required to give reasons and employee may appeal to Dean or President | 2 | 4.5 | 1,626 | 2.6 |
| Employer not required to give reasons but employee may appeal to grievance procedure | 6 | 13.6 | 2,823 | 4.5 |
| Employer not required to give reasons but employee may appeal to appeal committee | 3 | 6.8 | 1,112 | 1.8 |
| Employer not required to give reasons but employee may appeal to Dean or President | 1 | 2.3 | 1,400 | 2.2 |
| Other or not specified | 8 | 18.2 | 18,187 | 28.9 |
| TOTAL | 44 | 100% | 63,017 | 100% |

Source: "BRAIN"